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(3)

No. 01-936

IN THE

Supreme Court of the United States

MARY PAMELA BESSER AND
RICHARD GREEN,

Petitioners,

v.

KENNETH E. HARDY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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Supreme Court, U.S.
FILED
MAR 12 2002
CLERK

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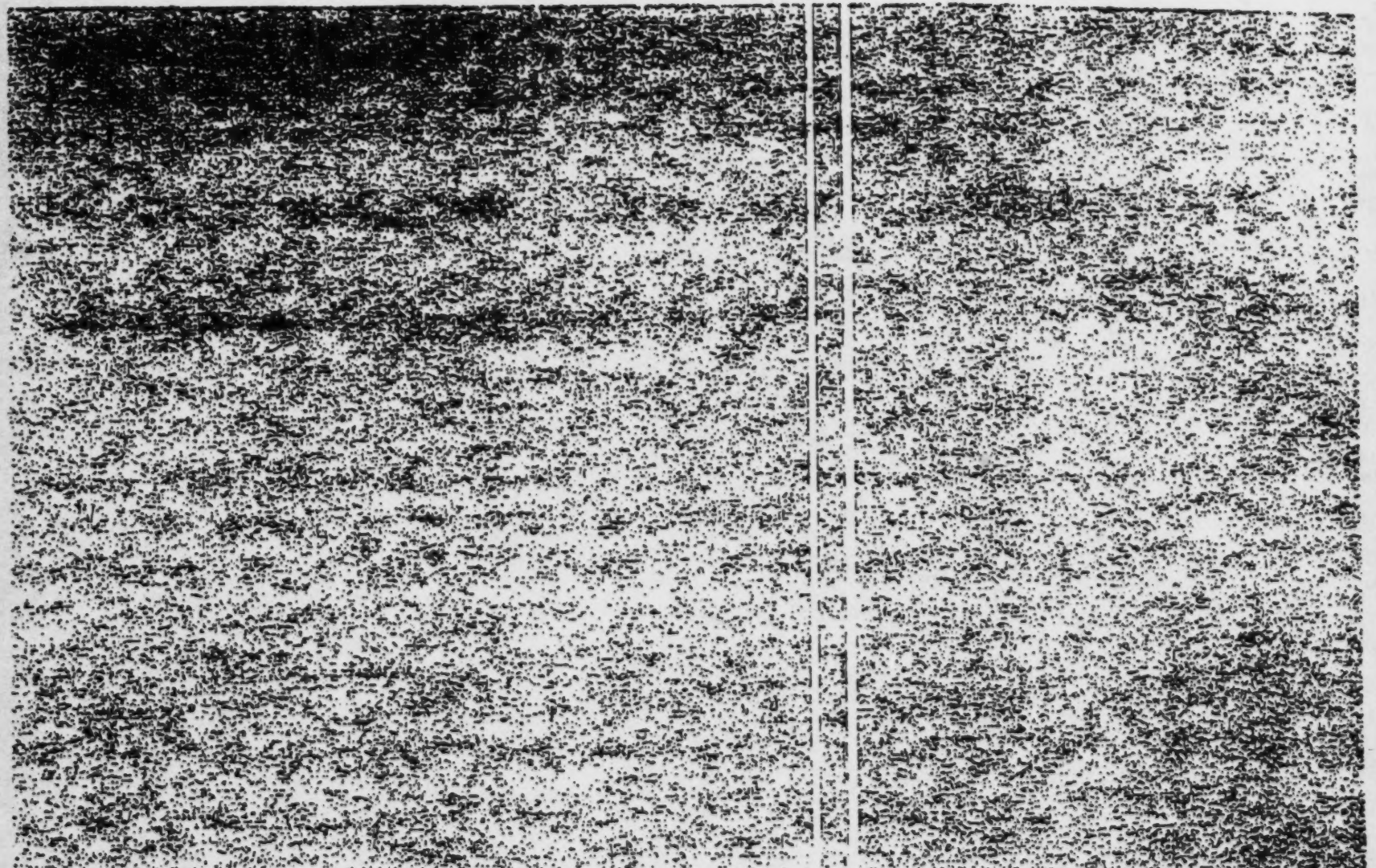


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Constitutional Provisions:

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Other Authorities:

Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & Educ. 1 (2001) 9

Rachel E. Fugate, Comment, *Choppy Waters Are Forecast for Academic Free Speech*, 26 Fla. St. U. L. Rev. 187 (1998) 9

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REPLY BRIEF FOR PETITIONERS

1. Respondent Kenneth Hardy's opposition brief offers considerable support for the petition for certiorari. Hardy concedes that the boundaries of academic freedom for publicly employed teachers are "unsettled." Opp. 7. He admits that the circuits are divided on the level of protection afforded to speech by educators as compared to other public employees. *Id.* at 8 n.3. And he agrees that the "constitutional magnitude" of the issue before this Court is "undeniably great." *Id.* at 14.

Even more telling is what his brief does not do. Hardy does not dispute our contention that the state courts are divided on the Question Presented. Pet. 19-20. Nor does he address the extensive academic commentary detailing the

conflict in the lower courts on whether and to what extent a teacher's classroom speech receives constitutional protection. *Id.* at 18-19. Hardy likewise does not contest that the circuit courts are divided on which of this Court's First Amendment precedents applies to questions of teacher speech, with some courts applying the analysis of *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), and others the balancing test set forth in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) and *Connick* v. *Myers*, 461 U.S. 138 (1983). More importantly, he lets pass without comment our demonstration that the courts that apply *Hazelwood* to the Question Presented conflict with the approach of the Sixth Circuit below. Pet. 15-16. Finally, and most revealingly, Hardy never disputes that the Sixth Circuit itself expressly acknowledges a circuit conflict on the very proposition on which petitioners seek certiorari. *See Cockrel* v. *Shelby County Sch. Dist.*, 270 F.3d 1036, 1051 (6th Cir. 2001).

Having conceded so much, Hardy attempts to redefine the issues before this Court in an effort to manufacture common ground among the circuits. These efforts cannot withstand scrutiny.

2. Because the Question Presented reveals an unmistakable circuit split, respondent ignores it altogether. Hardy asserts that we argue that "teachers abandon their First Amendment rights when they enter their workplace." Opp. 9. Unsurprisingly, this assertion and others like it are without citation to the petition for certiorari, for they grossly mischaracterize our position. The issue is not whether teachers ever enjoy First Amendment protections while on school grounds; they assuredly do.[1] The question is whether "First Amendment

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[1] Indeed, courts accord differing levels of protection to teacher speech on school grounds based on whether instructors are acting as teachers at the time. *See, e.g., California Teachers Ass'n* v. *Governing Bd. of San Diego Unified Sch. Dist.*, 53 Cal. Rptr. 2d 474, 479-481 (Ct. App. 1996) (school board could restrict wearing

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protection extends to a state college instructor's *classroom speech when the instructor is speaking as an employee* of the college." Pet. i (emphasis added). On this point, the decision below flatly contradicts decisions from the Third, Fourth, and Fifth Circuits.

In fact, Hardy's own analysis reveals the fault line dividing the courts of appeals. In setting forth the procedural history, Hardy focuses—as we did—upon the Sixth Circuit's conclusion that his use of offensive words implicated matters of public concern precisely *because* that speech was "germane to the subject matter of his lecture on the power and effect of language" and "limited to an academic discussion of the words in question." Opp. 5 (citing Pet. App. 11a). In short, he agrees with us that the Sixth Circuit extended First Amendment protection to his classroom speech because he spoke in his role as a state-employed teacher.

This is the nub of the circuit conflict. As explained in the petition, the Third, Fourth, and Fifth Circuits take a contrary approach. These courts conclude that classroom speech like Hardy's is ineligible for the *Pickering/Connick* balancing test because such speech is delivered by the teacher as an employee. *See* Pet. 10-13 (collecting and discussing cases); *Urofsky* v. *Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000) (en banc) (explaining that in considering whether employee speech merits First Amendment protection, "the [Supreme] Court has emphasized the *unrelatedness* of the speech at issue to the speaker's employment duties") (emphasis added), *cert. denied*, 531 U.S. 1070 (2001). The Third, Fourth, and Fifth Circuits thus echo this Court's explanation in *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 833 (1995), that "[w]hen the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate

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of political buttons while employees are engaged in curricular activities, but could not enforce rule in noninstructional settings).

the content of what is or is not expressed when it is the speaker." By contrast, the Sixth Circuit accords the greatest individual First Amendment protection to precisely that sort of speech, bestowing on individual teachers a First Amendment right to determine the content of curricula notwithstanding a school's contrary educational objectives.

3. While conceding that the boundaries of academic freedom are "admittedly unsettled," Hardy asserts that no case "advocates the radical notion that the First Amendment never protects classroom speech." Opp. 7. Of course, numerous courts have denied First Amendment protection to classroom speech by publicly employed teachers when they speak on behalf of their employers. The Third Circuit, for example, expressly holds that "[a]lthough a teacher's *out-of-class* conduct, including her advocacy of particular teaching methods is protected, * * * her *in-class* conduct is not." *Bradley* v. *Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (emphases added).[2]

Hardy makes no effort to distinguish this holding. Indeed he never even mentions either *Bradley* or *Edwards* v. *California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999), which rules to the same effect. Instead, Hardy looks for circuit uniformity in unrelated cases. These precedents do not address whether a

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[2] Hardy attempts to confuse the issue by speaking in absolutes. He employs the term "classroom speech" in its broadest connotation to encompass any utterance within the four walls of a classroom. This case is not about *any* utterance within a classroom confines, but rather about the degree of control the state may exercise over pedagogical speech by its employees. *See Boring* v. *Buncombe County Bd. of Educ.*, 136 F.3d 364, 373 (4th Cir.) (en banc) (Luttig, J., concurring) ("In the * * * context of teacher in-class noncurricular speech, the teacher assuredly enjoys some First Amendment protection. In the * * * context of teacher in-class curricular speech, the teacher equally assuredly does not."), *cert. denied*, 525 U.S. 813 (1998).

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publicly employed teacher's classroom speech receives First Amendment protection, but rather the uncontroversial—and uncontested—proposition that employment-related matters are not automatically excluded from First Amendment analysis. Opp. 12-13 (discussing *Johnson* v. *Lincoln Univ.*, 776 F.2d 443 (3d Cir. 1985); *Trotman* v. *Board of Trustees of Lincoln Univ.*, 635 F.2d 216 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981)). The same error plagues Hardy's attempt to explain away the Sixth Circuit's clear conflict with the Fourth and Fifth Circuits. Opp. 8-9 (discussing *Stroman* v. *Colleton County Sch. Dist.*, 981 F.2d 152 (4th Cir. 1992); *Hall* v. *Marion Sch. Dist. No. 2*, 31 F.3d 183 (4th Cir. 1994)), *id.* at 12 (discussing *Kennedy* v. *Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359 (5th Cir. 2000); *Tompkins* v. *Vickers*, 26 F.3d 603 (5th Cir. 1994)). None of these cases addresses the unique issues at play when a teacher appears as the school's representative in a classroom setting.

4. Hardy's efforts to distinguish the holdings of the Fourth and Fifth Circuits are unconvincing. He contends that the Fourth Circuit's holding in *Urofsky* v. *Gilmore* is somehow consistent with the ruling below because *Urofsky* involved a facial challenge. Opp. 7-8. This fact had no bearing on the Fourth Circuit's holding, which was that speech made by a public employee in his capacity as an employee speaking for the government merits no First Amendment protection regardless of the importance of the issues involved. 216 F.3d at 407.

Indeed, Hardy acknowledges that *Urofsky* affords public employers the right to make content choices. Opp. 7. Yet, he makes no effort to explain why the alleged retaliation for his pedagogical use of offensive language is not a similarly valid content choice. Instead, he claims that the issue of "suppressing academic speech" was not before the Fourth Circuit, *id.* at 8, a claim wholly at odds with *Urofsky*'s result, which rejected a challenge by professors to restrictions on speech undertaken in their capacity as employees. The rule

adopted by the Fourth Circuit—excluding employee speech on employment-related matters from First Amendment protection—sweeps broadly to encompass academic and non-academic speech alike, for the court held that state-employed professors enjoy no rights beyond those shared by all public employees. *Urofsky*, 216 F.3d at 415.[3] In any case, the Fourth Circuit has likewise explicitly denied First Amendment protection to teachers for disputes over curricular matters in another case that Hardy's opposition ignores. *See Boring* v. *Buncombe County Bd. of Educ.*, 136 F.3d at 369; Pet. 11.

Nor can Hardy persuasively distinguish the Fifth Circuit's ruling in *Kirkland* v. *Northside Independent School District*. Though he makes much of the fact that *Kirkland* based its rejection of the teacher's First Amendment claim on a variety of factors, he does not address the court's point that the key question in determining whether a teacher's speech touches on a matter of public concern is whether the teacher speaks "in his *role as a citizen* and not in his *role as an employee* of the school district." 890 F.2d 794, 798-799 (5th Cir. 1989) (emphases in original), *cert. denied*, 496 U.S. 926 (1990). The question of the capacity in which a teacher is speaking is always central to the analysis.[4]

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[3] Hardy attaches considerable weight to the Fourth Circuit's tepid reservation of the question whether the refusal to permit particular research projects might ever raise constitutional issues. Opp. 8 (citing *Urofsky*, 216 F.3d at 415 n.17). This reservation, of course, does not affect the court's holding that professors who speak in their capacity as employees do not touch on matters of public concern for purposes of the *Pickering/Connick* framework. Indeed, the footnote gives no hint what these hypothetical constitutional issues may be.

[4] Curiously, Hardy sees the *Kirkland* court's statement that "[w]e hold only that public school teachers are not free, under the first amendment, to arrogate control of the curricula," 890 F.2d at 802, as somehow vindicating his position. In this case, of course,

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Nor is *Kirkland* an aberration; it is rooted in prior Fifth Circuit precedent holding that the role in which a public employee speaks determines whether the speech touches on a matter of public concern sufficient to trigger the *Pickering/Connick* balancing test. *Terrell* v. *Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986) ("our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee"), *cert. denied*, 479 U.S. 1064 (1987); *Kirkland*, 890 F.2d at 798-799 (citing *Terrell*).

Indeed, the Sixth Circuit itself acknowledges what Hardy denies. In *Cockrel* v. *Shelby County School District*, the court explicitly took issue with the Fourth and Fifth Circuits' treatment of a teacher's classroom speech in holding that a teacher's in-class speech on controversial subjects can touch on a public concern:

> We believe that the Fourth and Fifth Circuits have extended the holding of *Connick* beyond what the Supreme Court intended. Under the courts' analyses in *Boring* and *Kirkland*, a teacher, regardless of what he decides to include in his curriculum, is speaking as an employee on a private matter. ***This essentially gives a teacher no right to freedom of speech when teaching students in a classroom, for the very act of teaching is what the employee is paid to do.*** * * * In [plaintiff's] case, although she was speaking in her role as an employee when presenting information on the environmental benefits of industrial hemp, the content of her speech * * * most certainly involved matters related to the political and social concern

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Hardy's challenged speech was entirely curricular in nature. By ruling that Hardy's pedagogical use of offensive language could not be the basis for h[illegible] termination, the Sixth Circuit ruled that teachers have some co[illegible]rol over the curriculum that is shielded from administrative scrutiny. The case on petition thus directly conflicts with *Kirkland*.

> of the community, as opposed to mere matters of private interest. Thus, *contrary to the analyses in Boring and Kirkland*, we hold that [plaintiff's] speech does touch on matters of public concern. [*Cockrel*, 270 F.3d at 1051-52 (emphases added) (citations omitted).]

Hardy makes no effort to confront this analysis by the very court of appeals he seeks to defend. Nor, for that matter, does he address our contention that the same division of authority plaguing the courts of appeals likewise pervades the state courts. Pet. 19-20.

5. Hardy concedes that a circuit split exists on the scope of constitutional protection for academic freedom. He agrees that the "boundaries" of the concept as a constitutional matter are "admittedly unsettled," and that there "appears to be a division among the circuits" on the matter. Opp. 7, 8 n.3. This is no tangential concession, for the notion of an *individual* right to academic freedom lies at the very heart of the Sixth Circuit's opinion.

Hardy himself suggests the centrality of academic freedom to the ruling below by commencing his argument with a quote from the Sixth Circuit's analysis of this Court's academic freedom precedents. Opp. 6. When read without his editing, the passage reveals that the notion of academic freedom was critical to Hardy's victory before the court of appeals. "*In light of these precedents*, the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive." Pet. App. 13a (emphasis added); *see also id.* ("In balancing the competing interests involved, we must take into account the robust tradition of academic freedom in our nation's post-secondary schools.").

This outcome is simply impossible in those courts of appeals that do not recognize academic freedom as an individual right. Pet. 17 (collecting cases). As discussed in the petition, the conflict between the Sixth and Fourth Circuits

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on this point is especially stark. While the Sixth Circuit examined this Court's academic freedom precedents and concluded that they trump an institution's interest in controlling the in-class pedagogical speech of its employees, the *Urofsky* court examined the same precedents and reached precisely the opposite conclusion. "The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an *institutional* right of self-governance in academic affairs." *Urofsky*, 216 F.3d at 412 (emphasis added). The sharp conflict among the circuits on the extent to which there is an individual right to academic freedom supports granting the petition.

6. Hardy contends that this Court has "confronted the issue many times before, and has made the considered decision not to establish a bright-line test, instead preferring a case-specific and fact-specific approach." Opp. 14. This argument fails for two reasons.

First, it is premised on Hardy's misreading of the Question Presented to be about establishing uniform rules for all public employees. *Id.* As discussed above, this case is about the First Amendment protection afforded to a teacher's curricular speech made in his capacity as a state employee, an issue that this Court has never clearly settled. *See, e.g.*, *California Teachers Ass'n* v. *State Bd. of Educ.*, 271 F.3d 1141, 1148-49 & n.6 (9th Cir. 2001) ("Neither this court nor the Supreme Court has definitively resolved whether and to what extent a teacher's instructional speech is protected by the First Amendment."); Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & Educ. 1, 6 (2001) ("The Supreme Court has yet to squarely address what level of protection, if any, should be accorded to teachers' in-class speech."); Rachel E. Fugate, Comment, *Choppy Waters Are Forecast for Academic Free Speech*, 26 Fla. St. U. L. Rev. 187, 203 (1998) ("the Supreme Court has not addressed the level of protection that such speech demands"). Hardy offers no authority to the contrary.

Second, Hardy's claim that a "bright-line" rule contradicts *Connick* and *Pickering* is an argument on the merits, not a basis for denying certiorari. As discussed above and in the petition, the division among the circuits is based on contrary readings of what this Court's cases require. Only this Court can resolve that conflict.

At the moment, the rule applied to the Question Presented varies from circuit to circuit. The time is right for this Court to resolve the deepening confusion in the lower courts.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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